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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 667

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on September 16, 1960, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing appellants' complaint as moot. Appellants sought to set aside and enjoin an order of the Commission, originally issued on January 9, 1959 (J.S. 7a–8a), and amended several times thereafter (J.S. 9a–14a), granting the intervening rail carriers tem-

porary authority under Section 4(1) of the Interstate Commerce Act, 49 U.S.C. 4(1), to operate in a manner inconsistent with the long and short haul provisions of that section pending a hearing on the railroads' application for permanent relief from its requirements. In addition the appellants sought declaratory relief, under the Declaratory Judgment Act, 28 U.S.C. 2201, and the Administrative Procedure Act, 5 U.S.C. 1009, with respect to the general authority of the Commission to enter temporary Section 4 orders without making the investigation or findings of fact which they alleged to be required prior to the grant of any Section 4 relief. The three-judge district court dismissed the case as moot upon being advised that the Commission had approved the railroads' withdrawal of their Section 4 application subsequent to a revision of their tariffs to lower the intermediate rates and thus eliminate the long-short haul differential which had originally necessitated the application.

The controversy relates to the rates charged by various groups of railroads for the shipment of grain from northern Illinois. In December, 1958, tariffs lowering the long haul rates for transporting this grain were filed with the Commission, to become effective, unless suspended, on January 10, 1959. Since the rates to various intermediate points were not also being reduced, applications for relief from the requirements of Section 4 of the Act were simultaneously filed with the Commission. These latter applications were opposed by the appellants and their representatives, and objections were also raised to the

reasonableness of the proposed rates. On January 9, 1959, the Commission (Division 2), though refusing to suspend the tariffs, instituted an investigation into the lawfulness of the rates, and simultaneously issued the temporary Section 4 order here in issue. The rate investigation and the fourth section application were consolidated for hearing.

On November 16, 1959, while the case was still pending in hearing status, the appellants brought this action in the district court. Prior to the hearing in the three-judge court the rail carriers published new tariffs, effective March 10, 1960, which, by reducing the rates for grain from and to the intermediate points to the same level applicable between the terminal points, removed the disparity prohibited by Section 4 in the absence of special Commission approval.[1] Accordingly, on March 28, 1960, the rail carriers withdrew their Section 4 applications and on March 31, 1960, the Commission acknowledged the withdrawal (J.S. 3a). These facts were brought to the district court's attention by motions to dismiss, and on September 16, 1960, it issued its *per curiam* opinion (J.S. 1a–5a) and order (J.S. 6a) here under review dismissing the cause as moot.

ARGUMENT

While the jurisdictional statement discusses a number of questions relating to the adequacy of the Commission's order granting temporary relief from

[1] See *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 564.

the long and short haul requirements of Section 4 of the Interstate Commerce Act (J.S. 3–4, 12–14), the only questions decided below are those relating to the district court's jurisdiction to entertain the action in the light of the railroads' withdrawal of their Section 4 application. The district court's conclusion that no case or controversy calling for the exercise of its judicial functions existed after the withdrawal of the Section 4 applications was correct and no question warranting plenary review by this Court is presented by the appeal.

1. Appellants do not and cannot contend that they have any present interest in the temporary Section 4 order issued by the Commission on January 9, 1959, the validity of which they challenged in the court below. As appellants note (J.S. 8), the order has never technically been cancelled, but it was applicable only during the period of the Commission's consideration of fourth section application No. 35140 (J.S. 7a), and with the latter's withdrawal ceased to have any effect. Were any of the railroads to file new tariffs requiring relief under Section 4, they would have to secure new approval from the Commission on the basis of the facts then existing. Moreover, since none of the appellants here are shippers, there can be no question as to damages for violation of Section 4 of the Act, even assuming *arguendo* that damages would lie where the Commission grants an application for relief from the requirements of Section 4, but does so in an allegedly defective manner. There is thus nothing about the order which might warrant further re-

view proceedings, after the particular order has terminated, on the ground that the situation created by its adoption continues to exist. Cf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498.

2. Recognizing that in an almost identical situation this Court dismissed an appeal as moot (*Atchison, Topeka & Santa Fe Railway Co.* v. *Dixie Carriers*, 355 U.S. 179;[1] see also *United States* v. *Amarillo-Borger Express*, 352 U.S. 1028), appellants argue that the present case is distinguishable because they are also seeking declaratory relief, *i.e.*, a court determination that the allegedly consistent practice of the Commission in issuing temporary Section 4 orders without adequate investigation or findings is contrary to law. But, as the district court pointed out (J.S. 4a–5a), the right of a court to render declaratory judgments depends upon the continuing existence of a case or controversy. With the withdrawal of the Section 4 application here "the chance of any controversy that existed has been terminated" (J.S. 5a). "To lay down rules of practice for future guidance of the Commission" (*ibid.*) would be to give an advisory opinion on an abstract question of law, which the federal courts are "without power" to do. *Amalgamated Association of Street, Etc., Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418; see

[1] In *Dixie Carriers* the Commission had granted temporary relief from Section 4, as here, but had initially suspended the rates, an action it rescinded on rehearing. The district court held

Local No. 8-6, Oil, Chemical and Atomic Workers Unions v. Missouri, 361 U.S. 363, 367.[1]

The proceeding involved in this case presents a classic situation for application of the general rule on mootness. There was nothing before the court below indicative of the extent or nature of the alleged Commission policy and it would be a fruitless task to attempt an advance determination of the investigation and findings, if any, which would be necessary to justify temporary Section 4 relief in all future situations. Nor is there anything demonstrating that the appellants here have any real interest in such a determination. Certainly the rail carriers' reduction of their intermediate rates some 15 months after the entry of the challenged order, and their consequent withdrawal of the Section 4 application, does not indicate any general or repeated pattern of attempting to secure unreviewable short term advantages over

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that both the recession of the suspension and the grant of the temporary Section 4 relief were void. This Court noted probable jurisdiction to review both determinations, but before filing of briefs the Commission completed its investigation and set aside the rates. The Court then dismissed the case as moot.

[1] While appellants seek to invoke the Declaratory Judgment Act, 28 U.S.C. 2201-02, as an alternative to review under the Urgent Deficiencies Act of 1913, 28 U.S.C. 2321-25, it is clear that the Declaratory Judgment Act cannot be used as a substitute for the statutory methods of review applicable to orders of the Commission. *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237, 246; *Charles Nooding Trucking Co. v. United States*, 29 F. Supp. 537-54 (D.N.J.).

competing methods of transportation,[4] a practice which the Commission would be fully equipped to prevent if it in fact developed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal presents no substantial question, and that the judgment of the district court should be affirmed.

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[4] In the two other cases cited by appellants (J.S. 10) to show a pattern of railroad conduct to secure temporary Section 4 orders and then avoid a court challenge by withdrawing the applications, the district court had issued temporary restraining orders enjoining the effectiveness of both the temporary Section 4 orders *and* the underlying tariffs, and the cases became moot when the railroads subsequently filed new tariffs not involving any Section 4 question.

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